89-909

No. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
Petitioner,

v.

UNITED STATES OF AMERICA and
THE FEDERAL DEPOSIT
INSURANCE CORPORATION,
as Receiver for MBANK HOUSTON, N.A.
and THE DEPOSIT INSURANCE BRIDGE BANK, N.A.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONER

72 pp

QUESTIONS PRESENTED

1. May a judgment creditor perfect a judgment lien against the real property of a national bank prior to the exhaustion of appeals?

2. Must the United States demonstrate a threat to its financial or regulatory interests in order to have standing to sue to enjoin purported violations of 12 U.S.C. § 91?

3. Must a court find irreparable injury and balance the equities before it enjoins violations of 12 U.S.C. § 91?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Suzan E. Taylor d/b/a Exploration Services ("Taylor"), files this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and asks this Court to vacate the judgment, render judgment for Petitioner on the questions presented, and remand the case to the trial

court for consideration of Petitioner's pending counterclaims.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 881 F.2d 207. The Memorandum and Order of the trial court (App. B) are not officially reported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on August 28, 1989, affirming interlocutory orders granting injunctive relief against Taylor. App. I. A timely motion for rehearing was filed by Taylor which was overruled on September 26, 1989. App. H This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

12 U.S.C. § 91:

> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or

> in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; *and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.*

(emphasis supplied).

STATEMENT

After more than three years of litigation and six weeks of trial, Taylor obtained a judgment against MBank Houston, N.A. ("MBank") and other parties on February 27, 1989, in the 152nd Judicial District Court of Harris County, Texas. The amount of the judgment against MBank was $9,639,841.65. Other defendants unconnected with MBank were jointly and severally liable with MBank for damages in the amount of $2,489,361.81 and were individually liable for an additional $1,046,685.55 in damages. App. C.

In hearings on February 27 and again on March 1, 1989, MBank asked the state trial court for an order prohibiting Taylor from perfecting a judgment lien by filing an abstract of her judgment. That request was twice denied by the state court. However, the state court did order Taylor not to enforce the judgment against MBank by way of an attachment, execution, or injunction without the court's permission. App. D.

Taylor then asked the District Clerk of Harris County, Texas, to prepare an abstract of judgment. That abstract was filed in the real property records of Harris County, Texas, at 11:26 a.m., on March 1, 1989. Failing to get the state court to order Taylor not to file an abstract of judgment, MBank enlisted the assistance of the Office of the Comptroller of the Currency ("OCC"). By doing so, MBank evaded the res judicata effect of the state court's refusal to interfere with Taylor's judgment lien and avoided posting an injunction bond. The United States, on behalf of the OCC, responded to MBank's call for help by filing, on the morning of March 1, 1989, a complaint purporting to sue both Taylor and MBank and asking for an injunction prohibiting Taylor from filing an abstract of judgment. Federal court jurisdiction was premised on 28 U.S.C. § 1345.

The collusion between MBank and the OCC was demonstrated by the fact that MBank admitted all of the allegations in the complaint filed by the United States and took the leading role in the hearings on the temporary restraining order and the preliminary injunction. The trial court recognized that MBank's interests were identical to those of the United States and ultimately realigned the parties so as to make MBank a plaintiff. App. B.

Nine minutes after Taylor filed her abstract of judgment, the trial court issued an order temporarily restraining Taylor from filing abstracts of judgment. App. E. This order was entered even though the complaint filed by the United States failed to allege an injury to any regulatory interest of the United States and was unsupported by an affidavit or verified

pleading.[1] Despite MBank's request, the trial court refused to order Taylor to withdraw any abstracts of judgment filed before entry of the temporary restraining order. *Id.*

The trial court held a hearing on March 9, 1989, on the application for a preliminary injunction. The United States refused to present any evidence at that hearing and elected to rely on the hearsay affidavit of Mr. Rushton and the pleadings. Taylor objected to the government's failure to carry its burden of proof by admissible evidence. After the hearing, the temporary restraining order was extended on March 14, 1989, without notice to Taylor.

The trial court entered a preliminary injunction on March 21, 1989, forbidding Taylor from enforcing or seeking to enforce any writs of attachment, writs of garnishment, abstracts of judgment, judgment liens, or executions upon the state court judgment. App. B. The preliminary injunction also ordered Taylor to "take all necessary steps to withdraw any and all abstracts of judgment or judgment liens issued against MBank Houston in the state court proceedings" and ordered that all abstracts of judgment or judgment liens issued against MBank commanding the bank to preserve its assets shall have no force or effect. *Id.* Taylor filed her notice of appeal from this order on March 22, 1989.

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1. An affidavit of Emory W. Rushton was filed in support of the complaint for injunctive relief over four hours after the complaint was filed and three hours after the trial court signed the temporary restraining order.

Findings of fact and conclusions of law were prepared by the trial court and included in the Memorandum and Order. App. B. The findings of fact involved uncontested matters concerning the status of the parties and the state court litigation. There were no findings that an interest of the United States was in danger of irreparable injury, that the equities favored the United States, that the public interest would be served by an injunction, or that the United States would probably succeed on the merits. The only basis for injunctive relief was the trial court's erroneous conclusion that 12 U.S.C. § 91 prohibits judgment liens against real estate owned by national banks.

On April 14, 1989, the Federal Deposit Insurance Corporation, as Receiver for MBank, and the Deposit Insurance Bridge Bank, N.A. ("Bridge Bank"), successor in interest to MBank, intervened in the case.[2] The Receiver and Bridge Bank also filed a motion for contempt against Taylor on April 14, alleging that Taylor's failure to release and discharge the abstract of judgment was a violation of the trial court's March 21, 1989, order. A hearing on this motion was held on April 17, 1989. Without hearing any evidence, the trial court ruled in an order dated April 18, 1989, that Taylor had violated the March 21 order, directed Taylor to sign a release no later than April 24, 1989, and denied Taylor's request that the

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2. MBank was declared insolvent on March 28, 1989, and that is the date the insolvency of the bank was established for purposes of 12 U.S.C. § 91. There were no pleadings, evidence, or findings of insolvency to support the March 21, 1989, injunction.

order be stayed pending Taylor's appeal of the March 21 and April 18 orders. App. F. Taylor filed her notice of appeal from the second order on April 18, 1989, and asked the Court of Appeals on April 19, 1989, to stay the order pending resolution of her appeals. That request was denied on April 21, 1989. App. G.

Taylor's appeals were consolidated by agreement of the parties and were submitted to the Court of Appeals after oral argument on July 11, 1989. The Court of Appeals affirmed the orders of the trial court on August 28, 1989 (App. A), and overruled Taylor's petition for panel rehearing on September 26, 1989. App. H.

REASONS FOR GRANTING THE WRIT

With this country's banking system awash in red ink, various agencies of the federal government have attempted to shift the losses from federal deposit insurance funds to the creditors of failed institutions. The FSLIC has claimed that the courts lacked jurisdiction to hear cases against insolvent savings and loan institutions. *See North Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). The FDIC has asserted that the assets and some of the liabilities of failed banks can be transferred to new banks leaving certain creditors with claims against no-asset receiverships. *See First Empire Bank v. FDIC*, 572 F.2d 1361 (9th Cir.), *cert. denied*, 439 U.S. 919 (1978). And the OCC now argues in the case at bar that 12 U.S.C. § 91 precludes a successful litigant from perfecting a judgment lien against the real estate assets of a

national bank until the bank exhausts all of its appeals. If a bank insolvency occurs while an appeal is pending, the FDIC contends that it can convey the real estate assets owned by the failed bank without regard to the rights of judgment creditors.

The federal courts have not allowed the federal government to accomplish a preference in favor of its agencies by shifting the risk of loss from its insurance funds to the creditors of financial institutions. This Court has removed the barriers to claims against savings and loan associations erected by *Hudspeth* and its progeny. *Coit Independence Joint Venture v. FSLIC*, 109 S. Ct. 1361 (1989). The United States Court of Appeals for the Ninth Circuit has ruled that purchase and assumption agreements cannot be used to strip bank receiverships of the assets necessary to satisfy the claims of creditors. *Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538, 541-42 (9th Cir. 1987); *First Empire Bank*, 572 F.2d at 1371. And this Court should now rule that 12 U.S.C. § 91 does not insulate the real estate assets of national banks from judgment liens.

A. A Judgment Creditor May Perfect a Judgment Lien Against the Real Property of a National Bank Before Appeals Are Concluded.

Congress enacted what is now the last clause of 12 U.S.C. § 91 in 1873. During the ensuing 116 years, no court held that the statute prohibits a judgment creditor from perfecting a judgment lien against the real property of national banks until the trial court below enjoined Taylor from filing her abstract of judgment. That injunction and the opinion

below disregard the express language of 12 U.S.C. § 91 and this Court's construction of that statute. *See Third Nat'l Bank v. Impac, Ltd.*, 432 U.S. 312 (1977). The opinion below is premised in part on a misunderstanding of the nature and effect of judgment liens in Texas. And the holding below conflicts with the holding in *United States v. Theos*, 709 F. Supp. 1007 (D. Colo. 1989).[3]

By its terms, 12 U.S.C. § 91 prohibits transfers of property. Most of the statute pertains to voluntary transfers of property made by national banks after insolvency or in contemplation of insolvency. The last clause of the statute prohibits involuntary transfers of property resulting from attachments, executions, or injunctions issued by courts prior to final judgment. This Court has recognized that the last clause of 12 U.S.C. § 91 was intended to prevent prejudgment *seizures* of bank assets. *Third Nat'l Bank*, 432 U.S. at 323-24.

A judgment lien is not a seizure of property and is, therefore, outside the purview of 12 U.S.C. § 91. This Court has long recognized that judgment liens are not property and confer no rights in the debtor's land. *Baker v. Morton*, 79 U.S. 150, 159 (1871); *Massingill v. Downs*, 48 U.S. (7 How.), 760, 767-68 (1849). The rule in Texas is that "[a] judgment lien does not create any right of property or interest in the lands upon which it is a lien." *Onyx Ref. Co. v. Evans Prod. Corp.*, 182 F. Supp. 253, 256 (N.D. Tex. 1959).

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3. Because the national bank that is the judgment debtor in *Theos* opted to post a bond, the United States has filed a motion asking the court to vacate its opinion as moot.

The judgment debtor simply has the right to foreclose, either by execution or by independent suit, which, when accomplished, will relate back to exclude adverse interests that arise subsequent to filing the lien. *Id.* The lien arises by operation of law through the filing and indexing of an abstract of judgment and requires neither additional action by a court nor the seizure of property by an official. TEX. PROP. CODE ANN. §§ 52.001-.007 (Vernon 1984 and Supp. 1989).

The rents, issues, and profits from real estate subject to a judgment lien pass to the landowner free of the lien. *Donley v. Youngstown Sheet & Tube Co.*, 328 S.W.2d 192, 196-97 (Tex. Civ. App.--Eastland 1959, writ ref'd n.r.e.). And a judgment lien does not attach to the proceeds of oil and gas production from leases subject to the lien. *Onyx Ref. Co.*, 182 F. Supp. at 256-57; *Donley*, 328 S.W.2d at 194-95. A supersedeas bond filed by the judgment debtor will suspend the right to foreclosure but does not impair or postpone the lien. *Onyx Ref. Co.*, 182 F. Supp. at. 256-57; *Roman v. Goldberg*, 7 S.W.2d 899 (Tex. Civ. App.--Waco 1928, writ ref'd). Because the lien neither creates an interest in property nor accomplishes the transfer of property, it can co-exist with a supersedeas bond.

The preliminary injunction against Taylor was premised on the trial court's erroneous conclusion that 12 U.S.C. § 91 prohibits any preference for a creditor of a national bank. This Court has, in fact, recognized that Congress never intended 12 U.S.C. § 91 to be a prohibition against all preferences and has

allowed preferential recoveries in favor of creditors whose rights arose pursuant to liens, equities, agreements, law, or the course of dealings between parties. *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 568 (1934); *Merrill v. National Bank*, 173 U.S. 131, 144-47 (1899); *Scott v. Armstrong*, 146 U.S. 499, 510 (1892).

In its decision on Taylor's appeal, the Court of Appeals determined that a judgment lien in Texas is the "functional equivalent" of an attachment of real property, noted that attachments are expressly prohibited by 12 U.S.C. § 91, and held that judgment liens are also proscribed by the statute. Thus, the Court of Appeals ignored this Court's admonition that the statute should not be given a literal meaning and ignored this Court's holding that the prejudgment remedies forbidden by the statute are those that accomplish a seizure of property. *See Third Nat'l Bank*, 432 U.S. at 320, 323-24. The Court of Appeals should have focused its inquiry on whether either procedure accomplishes a seizure of property.

Under Texas law, neither a writ of attachment nor a judgment lien seizes real property. Unlike attachments of personalty, an attachment of realty in Texas does not result in the physical seizure of real property. TEX. CIV. PRAC. & REM. CODE ANN. §§ 61.042-.043 (Vernon 1986). The levy of a writ of attachment against real property does not disturb the owner's possession, use, or enjoyment of the property and, without more, does not create a cause of action for the recovery of damages. *Olivares v. Garcia*, 127 Tex. 112, 91 S.W.2d 1059, 1061-62 (Tex. Comm'n App. 1936, opinion adopted); *Tsesmelis v. Sinton State*

Bank, 53 S.W.2d 461, 463-64 (Tex. Comm'n App. 1932, judgmt adopted); *First Nat'l Bank v. Cooper*, 12 S.W.2d 271, 274 (Tex.Civ.App.--Amarillo 1928, writ ref'd). To the extent judgment liens and attachments of real property are equivalent, neither is subject to the prohibitions of 12 U.S.C. § 91.

B. The Comptroller of the Currency Must Allege Injury to the Financial or Regulatory Interests of the United States in Order to Sue to Enjoin Violations of 12 U.S.C. § 91.

This Court held in *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 285-86 (1888), that suits by the government must be dismissed if they are brought for the benefit of private litigants instead of the general public. In the instant case, the OCC has intervened in a dispute between private litigants, Taylor and MBank. The OCC did so without alleging or proving that the interests of the United States would be adversely affected by Taylor's filing an abstract of judgment. No matter what theoretical case can now be made concerning the impact of Taylor's judgment lien on the solvency of MBank, that case was not made by the OCC or MBank in their pleadings or in the two hearings conducted by the trial court. No evidence was presented at those hearings, and the United States cannot now reconstruct the record that might have been made.

Although the Office of Comptroller of the Currency has authority to supervise and regulate the national banking system, there is no express statutory authorization for the United States to bring a suit to enforce 12 U.S.C. § 91. Therefore, the United States

was required to demonstrate some interest requiring judicial action in order to maintain this suit. *San Jacinto Tin Co.*, 125 U.S. at 285-86; 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2d § 3651 at 163 (1985). Having failed to do so, the suit should have been dismissed.

The standing issue in this case bears directly on the propriety of the trial court's action. A request for injunctive relief by MBank would have been subject to the preclusive effect of the state judge's decision that Taylor was entitled to perfect her judgment lien; if an injunction had been issued, MBank would have been required to comply with the bonding requirements of Rule 65(c), Federal Rules of Civil Procedure. MBank avoided these difficulties by engaging, as its champion, the OCC.

C. A Court Must Find Irreparable Injury and Must Balance the Equities Before Enjoining Violations of 12 U.S.C. § 91.

The United States introduced no evidence in the trial court and relied solely on its allegations that 12 U.S.C. § 91 would be violated if an abstract of judgment were filed. No proof was offered to establish irreparable injury or any of the other requirements for injunctive relief. This Court has held that the requirements for preliminary injunctive relief are not relaxed because a party alleges the violation of a statute. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-14 (1982). An injunction should not be issued solely upon proof of a statutory violation unless Congress intended injunctive relief to

be mandatory and thus relieved courts of the burden of determining the propriety of such relief. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542-43 (1987); *Weinberger*, 456 U.S. at 314-16; *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1155-56 (9th Cir. 1988). Nothing in 12 U.S.C. § 91 nor any related statute suggests that an injunction must issue to prevent violations of the statute. Therefore, the trial court erred in issuing a preliminary injunction without making findings as to irreparable injury, the public interest, the probability of success on the merits, and the balance of the equities.

CONCLUSION

The trial court issued an injunction on behalf of a party with no standing to sue and who presented no evidence that injunctive relief was necessary. The injunction was based upon an erroneous interpretation of 12 U.S.C. § 91 and ignored this Court's holding that the statute only prohibits prejudgment seizures of property. The effect of the injunction has been to prevent Taylor from perfecting a judgment lien by filing an abstract of judgment even though such liens do not seize property. As a result, her ability to enforce her judgment against MBank and against the other judgment debtors named in the

judgment has been impaired. The preliminary injunction entered by the district court should be withdrawn and the case remanded for trial of Taylor's counterclaim.

Respectfully submitted,

By: _____

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Petition for a Writ of Certiorari have been forwarded by messenger to Mr. Robert D. Daniel, Hirsch & Westheimer, P.C., 700 Louisiana, 25th Floor, Houston, Texas, and by United States mail, postage prepaid to Ms. Margaret Hewing and to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 on this _____ day of December, 1989.

ROBERT HAYDEN BURNS

APPENDICES

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

The FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBank Houston, N.A. and The Deposit Insurance Bridge Bank, N.A., Intervenors-Appellees,

v.

Suzan E. Taylor, d/b/a Exploration Services,
Defendant-Appellant.

Nos. 89-2328, 89-2373

United States Court of Appeals, Fifth Circuit.

Aug. 28, 1989

Before CLARK, Chief Judge, JOHNSON and SMITH, Circuit Judges.

CLARK, Chief Judge:

The United States of America filed this action on behalf of the Office of the Comptroller of the Currency (OCC). The United States brought the action to enjoin Susan E. Taylor d/b/a/ Exploration Services (Taylor) from filing an abstract of a state court judgment which would create a lien on property owned by MBank Houston, N.A. (MBank). The district court granted a preliminary injunction, and

ordered Taylor to release an abstract of judgment previously filed. We affirm.

I.

On February 27, 1989 Taylor obtained a $9.6 million judgment against MBank in a Texas state district court. The state court denied MBank's request for an order prohibiting Taylor from filing an abstract of the judgment. On March 1, 1989, prior to exhaustion of the appellate process, Taylor filed an abstract of the judgment with the Harris County Clerk. Under Texas law, the recorded abstract of judgment created a lien on all the real property of MBank located in Harris County, Texas. Tex. Prop.Code Ann. § 52.001 (Vernon 1984).

Also on March 1, 1989, the United States, on behalf of the OCC, filed this action in federal district court seeking a temporary restraining order and a preliminary injunction prohibiting Taylor from filing an abstract of judgment. The action was based on 12 U.S.C. § 91, which prohibits the issuance of an attachment injunction, or execution against a national bank or its property prior to a final judgment. The district court signed a temporary restraining order, but not until nine minutes after Taylor had filed the abstract of her state court judgment.

On March 21, 1989, the district court granted a preliminary injunction and ordered Taylor to

withdraw the abstract of judgment previously filed.[1] In response to the order, Taylor filed a notice in the Harris County property records announcing involuntary withdrawal of the abstract of judgment subject to appeal. On April 18, 1989, the district court ordered Taylor to completely release the abstract of judgment or be held in contempt. Taylor appeals the preliminary injunction and the order requiring release of the abstract of judgment.

II.

Taylor initially argues that the United States lacks standing to bring this action because it has not pled a sufficient governmental interest at stake. However, by pleading and affidavit, the United States has asserted that the OCC has a supervisory and regulatory interest in enforcing the safeguards mandated by 12 U.S.C. § 91. This interest stems from the OCC's obligation to ensure the safety and soundness of the national banking system for the benefit of depositors and the general public. *See* 12 U.S.C. § 1 *et seq.* The OCC's interest provides sufficient standing for the United States to bring this action. *United States v. Lemaire*, 826 F.2d 387, 388 n. 1, 390 (5th Cir.1987), *cert. denied*, ----- U.S. -----, 108 S.Ct. 1223, 99 L.Ed.2d 423 (1988).

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1. MBank was declared insolvent on March 28, 1989, and the Federal Deposit Insurance Corporation, as receiver for MBank, has intervened in this case in support of the United States.

Taylor next argues that 12 U.S.C. § 91 does not prohibit the filing of an abstract of judgment. Section 91 reads as follows:

> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

12 U.S.C. § 91.

Taylor does not argue that her judgment is final. Prior to conclusion of the appellate process it is not. *Lemaire*, 826 F.2d at 390. Rather, Taylor asserts that section 91 applies only to seizures of assets and not to the perfection of a judgment lien by recording an abstract of judgment. Taylor relies on the fact that

the last clause of section 91 expressly prohibits only attachments, injunctions, or executions, but does not mention abstracts of judgment. However, under Texas law an abstract of judgment is functionally equivalent to an attachment in that "[e]ach fixes a lien upon the title of the debtor subject to execution; which lien, in either event, is foreclosed through sale under execution." *Stewart v. Rockdale State Bank*, 52 S.W.2d 915, 916 (Tex.Civ.App. 1932), *aff'd*, 124 Tex. 431, 79 S.W.2d 116 (1935). *See* Tex. Civ. Prac. & Rem.Code Ann. § 61.061 (Vernon 1986) (attachment); Tex.Prop.Code Ann. § 52.001 (Vernon 1984) (abstract of judgment). An abstract of judgment is also similar to an injunction in that the lien created by an abstract of judgment prohibits a national bank from freely transferring its property. *Third National Bank in Nashville v. Impac, Ltd., Inc.*, 432 U.S. 312, 97 S.Ct. 2307, 2314 n. 18, 53 L.Ed.2d 368 (1977).

Furthermore, the Supreme Court has ruled that section 91 is not to be given a completely literal meaning. *See Impac Ltd.*, 97 S.Ct. at 2312. We have not limited section 91 to the prohibitions expressly mentioned, and have construed the statue to prohibit garnishment of a national bank's property prior to a final judgment. *Lemaire*, 826 F.2d 387. A non-restrictive reading of section 91 is necessary to effectuate the statutory purpose, which is to "prevent creditors from obtaining preferential treatment by court action, including the securing of a judgment at the trial court level." *Lemaire*, 826 F.2d at 390. In this case, the district court correctly found that by filing an abstract of judgment and obtaining a lien on MBank's property, Taylor would secure preferential treatment over the other general creditors of MBank.

Such action prior to a final judgment would violate 12 U.S.C. § 91.

Taylor asserts that if she is not allowed to file an abstract of judgment other creditors with liens against MBank's property will obtain a preference over her claims. However, 12 U.S.C. § 91 does not prohibit all liens against the property of a national bank, only those obtained prior to a final judgment. Even if the other creditor's liens acquire precedence, that would not justify Taylor's attempt to obtain preferential treatment for her lien prior to a final judgment--a form of preference prohibited by section 91.

Taylor next argues that the district court erred in granting a preliminary injunction without balancing the competing claims of injury and considering the public interest. Generally, in order to secure a preliminary injunction, the movant must prove 1) a substantial likelihood of success on the merits; 2) a substantial threat of irreparable injury if the injunction is not issued; 3) the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and 4) the injunction will not disserve the public interest. *Enterprise Int'l v. Corporacion Estatal Petrolera,* 762 F.2d 464, 471 (5th Cir.1985). However, if a statutory violation is involved and the statue by necessary and inescapable inference requires injunctive relief, the movant is not required to prove the injury and public interest factors. *Amoco Production Co. v Village of Gambell, Alaska,* 480 U.S. 531, 107 S.Ct. 1396, 1402-03, 94 L.Ed.2d 542(1987); *United States v. Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir.1969). In this case the district court correctly

concluded that the purpose of section 91--to prevent a creditor from obtaining preferential treatment prior to a final judgment--requires injunctive relief once a statutory violation is shown. Accordingly, the district court did not err in granting the preliminary injunction without requiring specific proof on the injury and public interest factors.

Finally, Taylor argues that the district court erred in requiring Taylor to release her abstract of judgment. Taylor acknowledges that the district court has the equitable power to return the parties to their last uncontested status. *See Canal Authority v. Callaway*, 489 F.2d 567, 576 (5th Cir.1974). Taylor argues, however, that the court erred in finding that the last uncontested status was the situation of the parties prior to the filing of Taylor's abstract of judgment. The record shows that Taylor's right to file an abstract of judgment was contested from the time the state court judgment was rendered. Taylor's action in filing the abstract remains the core of the present controversy. The finding of the district court that the last uncontested status was prior to the act of filing is not clearly erroneous.

The district court's judgment and order are

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
	§	
VS.	§	
	§	
	§	CIVIL ACTION
	§	NO. H-89-0672
	§	
	§	
SUZAN E. TAYLOR	§	
d/b/a EXPLORATION SERVICES	§	
AND MBANK HOUSTON, N.A.	§	

MEMORANDUM AND ORDER

Plaintiff, the United States of America, on behalf of the Office of the Comptroller of the Currency (OCC), brought this action seeking declaratory and injunctive relief against Defendants MBank Houston, N.A. (MBank) and Suzan E. Taylor, d/b/a Exploration Services (Taylor). In particular, the United States asked this Court to declare that 12 U.S.C. §91 precluded Taylor from filing an abstract of the judgment she recovered against MBank in a state court action styled *MBank Greens Parkway, N.A., et al v. Suzan E. Taylor d/b/a Exploration Services, et al,* No. 85-29591-A until MBank had exhausted its appellate remedies.

The United States filed motions for a temporary restraining order and a preliminary injunction with its complaint. The Court heard arguments in chambers from all parties regarding the United States' motion for a temporary restraining order on March 1, 1989. At 11:35 a.m., the Court granted the United States' request for a temporary restraining order preventing Taylor from, *inter alia*, filing her abstract of judgment against MBank with the County Clerk of Harris County, Texas.

Although the United States had also asked the Court to order Taylor to withdraw any previously filed abstract of judgment, the Court declined to do so at that time. Ultimately, the parties discovered that Taylor actually did succeed in filing her abstract of judgment against MBank with the Harris County Clerk at 11:26 a.m., nine minutes before the Court signed the temporary restraining order prohibiting such an act. Thus, the United States has renewed its request for an order requiring Taylor to withdraw her abstract of judgment.

Prior to the time set for the hearing on the United States' motion for a preliminary injunction, the parties filed a series of additional motions and claims. The United States filed a motion to consolidate the hearing on its motion for a preliminary injunction with the trial on the merits and a motion for a protective order regarding the deposition of Mr. Emory Rushton, Deputy Comptroller for Multinational Banking at the Office of the Comptroller of the Currency.

MBank, although nominally a defendant, formally joined in the United States' supplemental memorandum in support of its motions for a temporary restraining order and a preliminary injunction. MBank also filed its own motion to consolidate the hearing on the United States' motion for a preliminary injunction with the trial on the merits.

Taylor filed a cross-claim against MBank and a counterclaim against the United States for conspiring to prevent her from filing her abstract of judgment against MBank. Taylor also filed a motion for sanctions against the United States for its failure to produce Mr. Rushton at the deposition scheduled for March 7, 1989 and a motion to realign MBank as a plaintiff.

At the March 9, 1989 hearing on the United States' motion for a preliminary injunction, the United States argued that it was entitled to its requested relief as a matter of law and declined to present any testimony in support of its motion. Nevertheless, the Court heard arguments from counsel regarding the request for a preliminary injunction as well as arguments on all pending motions.

After considering the arguments of counsel and reviewing the record, the Court has decided to grant the United States a preliminary injunction as requested.

FINDINGS OF FACT

1. MBank is a national bank within the meaning of 12 U.S.C. § 21, et. seq.

2. The Office of the Comptroller of the Currency is charged with the responsibility of executing the laws relating to the national banking system. 12 U.S.C. §§ 1, 2.

3. On February 27, 1989, the 152nd Judicial District Court of Harris County, Texas entered judgment in favor of Taylor against MBank in a case styled *MBank Greens Parkway, N.A., et al. v. Suzan E. Taylor d/b/a Exploration Services*, No. 85-29591-A in the amount of $9,639,841.65. Although the state district court recognized that 12 U.S.C. § 91 prevented any attachment or execution on the judgment, it specifically allowed Taylor to immediately file an abstract of the judgment with the County Clerk of Harris County, Texas. On March 1, 1989, at 11:26 a.m., Taylor succeeded in filing an abstract of her judgment against MBank with the Harris County Clerk. Taylor's abstract of judgment now appears on the index to real property records maintained by the Harris County Clerk.

4. By filing her abstract of judgment with the Harris County Clerk, Taylor obtained a lien on all real property owned by MBank in Harris County and a preference over the other general creditors of MBank.

5. Preliminary injunctive relief is necessary to effectuate the purpose of 12 U.S.C. § 91.

6. The last uncontested status that preceded the pending controversy was after the entry of Taylor's judgment against MBank, but prior to the filing of Taylor's abstract of judgment with the Harris County Clerk.

7. The interests of the United States and of MBank in this case are aligned, not opposed.

8. Taylor's notice of the deposition of Mr. Emory W. Rushton, which was served upon the United States' counsel late on Friday, March 3,1989, did not provide the United States with reasonable notice of the March 7, 1989 deposition. Moreover, it would have been unduly burdensome to require Mr. Rushton, a Washington, D.C. resident who was ill at the time, to travel to Houston, Texas.

9. In light of Taylor's claims of conspiracy against MBank and the United States, it would be inequitable to consolidate the trial on the merits with the hearing on the United States' motion for a preliminary injunction.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1345 and 28 U.S.C. § 1331 (to the extent that MBank is realigned as a party plaintiff -- see Conclusion of Law 2).

2. It is the Court's duty to look beyond the pleadings and to arrange the parties according to their interests in a dispute. *City of Indianapolis v. Chase*

National Bank, 314 U.S. 63 (1941). Pursuant to Finding of Fact 7, the Court will realign MBank as a party plaintiff.

3. The United States, acting through the Office of the Comptroller of the Currency, has a sufficient interest in the regulation of the national banking system and the execution of its laws to have standing to bring this action. *In re Debs*, 158 U.S. 564 (1895); *United States v. Lemaire*, 826 F.2d 387 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1223 (1988); *United States v. LeMay*, 322 F.2d 100 (5th Cir. 1963).

4. The prohibitions of 12 U.S.C. § 91 protect all national banks, whether solvent or insolvent. *Third National Bank in Nashville v. Impac, Inc.*, 432 U.S. 312 (1977); *Van Reed v. People's National Bank of Lebanon*, 198 U.S. 554 (1905).

5. 12 U.S.C. § 91 prohibits a judgment creditor of a national bank from filing an abstract of judgment prior to the time the judgment becomes final by the exhaustion of all appeals, where, as under Texas law, the filing of such an abstract provides the judgment creditor with a lien on any property of the bank. Section 91, in relevant part, provides that "[n]o attachment, injunction, or execution, shall be issued against such association [i.e., a national bank] or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court." Taylor argues that she should be allowed to file her abstract of judgment against MBank because the statute does not expressly prohibit such a filing. However, the United States Supreme Court cautioned against a completely literal reading of section 91 in

Impac Limited, Inc., 432 U.S. at 316. Moreover, the Fifth Circuit Court of Appeals recently held that section 91 prohibited the issuance of a writ of garnishment against a national bank's property even though a writ of garnishment is not expressly mentioned in the statute. *Lemaire, supra.* In determining the appropriate scope of section 91's prohibitions, this Court must also be guided by the previous parts of the same section concerning preferential transfers. *Earle v. Pennsylvania*, 178 U.S. 449, 453 (1900). The Court has already found that the filing of the abstract of judgment gave Taylor a preference by virtue of a lien on all MBank's real property in Harris County (see Finding of Fact 4). The Court now concludes that section 91 was intended to prohibit exactly this kind of a preference based on a non-final judgment.

6. The United States need not strictly fulfill the requirements private litigants must meet in order to obtain a preliminary injunction where it seeks relief from a violation of federal law. *See, United States v. City of San Francisco*, 310 U.S. 16 (1940); *United States v. Hayes International Corporation*, 415 F.2d 1038 (5th Cir. 1969). Taylor violated 12 U.S.C. § 91 by filing her abstract of judgment against MBank; thus, the United States need not make any further showing of irreparable harm. Where federal statutes are violated, "the guiding principle for determining the propriety of equitable relief is whether an injunction is necessary to effectuate the congressional purpose behind the statute." *Security Industry Assoc. v. Board of Governors of the Federal Reserve System*, 628 F.Supp. 1438 (D.D.C. 1986). In this case, an injunction is necessary to effectuate the purpose of 12

U.S.C. § 91; i.e., to prevent a state judgment creditor from gaining any preference to a national bank's assets prior to the time all appeals are exhausted.

7. Although the Court has realigned MBank as a party plaintiff, it will not require MBank to post a bond as security for the issuance of a preliminary injunction. To do so would frustrate the clear intent of 12 U.S.C. § 91. Congress clearly intended that a national bank not be bound by any of the effects of a state court judgment until all appeals have been exhausted, without the necessity of posting security. Of course, United States is expressly exempted from any security requirement by Fed. R. Civ. P. 65(c).

8. The status quo to be protected by a preliminary injunction is the last uncontested status that preceded the pending controversy. *Mississippi Power & Light v. United Gas Pipeline Co.*, 609 F.Supp. 333 (D.C. Miss. 1984) *aff'd* 760 F.2d 618 (5th Cir. 1985). Because the Court found that the last uncontested status preceding the pending controversy existed prior to the time Taylor succeeded in filing her abstract of judgment (Finding of Fact 6), this Court will order her to withdraw the abstract.

9. Parties are entitled to reasonable notice for a deposition. Fed. R. Civ. P. 30(b) (1). Because the Court found that Taylor did not give the United States reasonable notice of Mr. Rushton's deposition (Finding of Fact 8), the Court will grant the United States' motion for a protective order and deny Taylor's motion for sanctions.

10. Consolidating the trial on the merits with a preliminary injunction hearing is a matter left to the discretion of the Court. Because the Court found that such a consolidation would have been inequitable in this case (Finding of Fact 9), the Court will deny MBank's and the United States' motions to consolidate the trial on the merits with the preliminary injunction hearing. Accordingly, it is hereby

ORDERED that Taylor's motion to realign MBank as a party plaintiff is GRANTED. It is further

ORDERED that the United States' motion for a protective order is GRANTED. It is further

ORDERED that Taylor's motion for sanctions is DENIED. It is further

ORDERED that the United States' motion for a preliminary injunction is GRANTED. It is further

ORDERED that Defendant Suzan E. Taylor d/b/a Exploration Services (Taylor) shall forthwith take all necessary steps to withdraw any and all abstracts of judgment or judgment liens issued against MBank Houston, N.A. in the state proceeding *MBank Greens Parkway. N.A. et al. v. Suzan E. Taylor d/b/a Exploration Services. et al.*, No. 85-29591-A, District Court, Harris County, Texas; and it is further

ORDERED that for the duration of this Order all abstracts of judgment or judgment liens issued against MBank Houston, N.A. in the aforementioned Texas state proceeding commanding lienee to

preserve the assets of MBank Houston, N.A. shall have no force or effect; and it is further

ORDERED that during the pendency of the Order, Defendant Taylor, including her attorneys, agents, and all other persons or entities acting on her behalf or in concert with her, are enjoined from enforcing or seeking to enforce any writs of attachment, writs of garnishment, abstracts of judgment, judgment liens or executions upon a judgment sought, filed, or entered against MBank Houston, N.A. in connection with the above-referenced state proceeding, including attempts at enforcement by seeking to hold third parties or MBank in contempt of state court orders declared herein to be temporarily of no force or effect; and it is further

ORDERED that for the duration of this Order MBank Houston, N.A. is prohibited from participating in any of the foregoing actions forbidden Taylor and all other persons or entities acting on her behalf.

DONE in Houston, Texas, this 21st day of March, 1989.

/s/ James DeAnda
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

NO. 85-29591-A

MBANK GREENS PARKWAY, N.A. and WORTH ENERGY CORPORATION,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	
SUZAN E. TAYLOR D/B/A EXPLORATION SERVICES,	§	HARRIS COUNTY, TEXAS
Defendant, Counter-Plaintiff, and Third Party Plaintiff,	§	
v.	§	
WORTH OPERATING, INC., AARON W. HEES, and JIM W. HOWARD,	§	
Third Party Defendants.	§	152ND JUDICIAL DISTRICT

FINAL JUDGMENT

On the 9th day of January, 1989, this case came on to be heard in its regular order. The Court is aware that Plaintiff, Worth Energy Corporation ("Worth Energy"), and Third Party Defendants, Aaron W. Hees ("Hees"), and Jim W. Howard ("Howard"), have each filed a separate petition in

bankruptcy in the United States Bankruptcy Court for the Western District of Texas, Austin Division. However, in each case, the Bankruptcy Court has lifted the automatic stay so that this cause could proceed to trial. The claims against Third Party Defendant Boguslaw Burczak have been severed to a separate cause.

Plaintiff, MBank Houston, N.A. ("MBank") appeared by and through its attorneys of record, announced ready for trial, and announced that it was the successor-in-interest to MBank Greens Parkway, N.A. and MBank Greenspoint, N.A. Worth Energy, and Defendant, Counter-Plaintiff, and Third Party Plaintiff, Suzan E. Taylor d/b/a Exploration Services ("Taylor"), appeared by and through their respective attorneys of record, and announced ready for trial. Third Party Defendants, Worth Operating, Inc., Hees, and Howard, did not appear for trial. The Court had previously entered an interlocutory judgment by default against Hees, which default judgment has become final by virtue of this Judgment.

A jury consisting of twelve good and lawful men and women was impaneled and sworn. Although Worth Energy participated in the voir dire of the jury, Worth Energy, through its counsel, subsequently announced that it would take a nonsuit against Taylor and declined to be present for the remainder of the trial.

MBank and Taylor made opening statements, and presented evidence in support of their respective claims and counterclaims. Thereafter, MBank presented rebuttal evidence. At the close of the

evidence, MBank presented a Motion for Directed Verdict against certain counterclaims of Taylor, which Motion was denied. Taylor then presented a Motion for Directed Verdict on certain claims against Worth Energy, Hees, and Howard, which Motion was granted on the ground that the evidence presented in support of the claims by Taylor against Worth Energy, Hees, and Howard, was uncontroverted. All parties rested. The Court then instructed the jury according to law and submitted the case to the jury on special issues. After closing argument, the jury retired to consider its verdict.

On the 21st day of February, 1989, the jury returned its findings in open Court. The verdict was received by the Court and filed and entered of record in the minutes of the Court. The Court has considered the pleadings on file in this case, the proof and evidence presented at trial, the stipulations of the parties, the verdict of the jury, and all other matters of record. The Court is of the opinion that a Judgment should be entered accordingly. Therefore, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover of and from MBank the total sum of Seven Million One Hundred Fifty Thousand Four Hundred Seventy-Nine and 84/100 Dollars ($7,150,479.84). Such amount consists of the following:

1. Damages in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00), for representing that its banking services were of a particular standard, quality or grade when they were of another;

2. Damages in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00), for committing an unconscionable action or course of action in connection with furnishing banking services to Taylor;

3. Damages in the sum of Three Hundred Seventy-Five Thousand Dollars ($375,000.00) for failure to act in good faith in connection with its banking transactions with Taylor;

4. Damages in the sum of One Million Dollars ($1,000,000.00) for tortious interference with Taylor's business relationships;

5. Prejudgment interest at the rate of ten percent (10%) compounded daily from January 1, 1985 through February 27, 1989, which amount is One Million Sixty-Nine Thousand Nine Hundred Thirty-Nine and 34/100 Dollars ($1,069,939.34);

6. Damages in the sum of Ten Thousand Dollars ($10,000.00) for conversion of Taylor's personal property;

7. Prejudgment interest at the rate of ten percent (10%) compounded daily from May 20, 1985 through February 27, 1989, which amount is Four Thousand Five Hundred Ninety and 08/100 Dollars ($4,590.08);

8. Additional damages in the sum of One Million Four Thousand Dollars ($1,004,000.00) pursuant to section 17.50(b)(1), Texas Business and Commerce Code;

9. Exemplary damages in the sum of Two Million Five Hundred Ten Thousand Dollars ($2,510,000.00); and

10. Attorneys' fees in the trial court in the amount of Six Hundred Seventy-Five Thousand Dollars ($675,000.00);

11. Less offset for indebtedness owed by Taylor to MBank in the sum of Ninety Thousand Eight Hundred Fifty and 69/100 Dollars ($90,850.69) plus interest at the rate of ten percent per annum (10%) from March 1, 1985 through February 27, 1989, which amount is Thirty-Six Thousand Three Hundred Fifteen and 39/100 Dollars ($36,315.39);

12. Less offset for indebtedness owed by Taylor to MBank in the sum of Fifty Thousand Four Hundred Eighty-Two and 88/100 Dollars ($50,482.88) plus interest at the rate of ten percent per annum (10%) from February 13, 1985 through February 27, 1989, which amount is Twenty Thousand Four Hundred and 62/100 Dollars ($20,400.62). Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover of and from MBank, Worth Energy, and Hees jointly and severally, the total sum of Two Million Four Hundred Eighty-Nine Thousand Three Hundred Sixty-One and 81/100 Dollars ($2,489,361.81). Such amount consists of the following:

1. Damages in the sum of Five Hundred Thousand Dollars ($500,000.00) for conspiracy;

2. Prejudgment interest at the rate of ten percent (10%) compounded daily from April 1, 1985 through February 27, 1989, which amount is the sum Two Hundred Thirty-Nine Thousand Three Hundred Sixty-One and 81/100 Dollars ($239,361.81); and

3. Exemplary damages in the sum of One Million Seven Hundred Fifty Thousand Dollars ($1,750,000.00). Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover of and from Worth Energy, Hees, and Howard, jointly and severally, the total sum of One Million Forty Six Thousand Six Hundred Eighty Five and 55/100 Dollars ($1,046,685.55). Such liability is premised on the following findings:

1. On July 23, 1984, Taylor entered into a contract with Worth Energy by which Taylor agreed to provide certain geological

and geophysical consulting work for Worth Energy ("the Contract");

2. Worth Energy and Hees induced Taylor to enter into the Contract by representing to her that she would receive the consideration set forth in the Contract, including (a) carried working interests in wells drilled pursuant to the Contract; (b) $500,000 in five equal installments; and (c) fifty percent of the promotion profits earned by Worth Energy for each well completed. Additionally, Worth Energy agreed to bear certain expenses incurred in connection with the performance of services pursuant to the Contract;

3. Taylor performed the services required of her under the Contract;

4. Worth Energy did not provide Taylor the full consideration set forth in the Contract, including reimbursement to Taylor for certain expenses and payment of promotion profits;

5. Hees and Howard are the alter ego of Worth Energy and are jointly and severally liable for the indebtedness of Worth Energy;

6. Worth Energy, Hees, and Howard, are liable to Taylor, jointly and severally, for damages for breach of contract in the total sum of Five Hundred Seventy-Five

Thousand One Hundred Twenty-Nine and 54/100 Dollars ($575,129.54) as follows:

(a) expenses due and owing to Taylor, in the amount of Ninety-One Thousand Forty-Eight and 24/100 Dollars ($91,048.24), all credits and offsets having been made;

(b) promotion profits due and owing to Taylor, in the amount of Three Hundred Fifty-Two Thousand Five Hundred Sixty-Three and 67/100 ($352,563.67); and

(c) production income due and owing to Taylor from the Byington-Hollar well, in the net amount of One Hundred Thirty-One Thousand Five Hundred Seventeen and 63/100 Dollars ($131,517.63);

7. Additionally, breach of the Contract with Taylor by Worth Energy, Hees, and Howard, was intentional and constitutes willful and malicious injury to Taylor and her property;

8. Worth Energy and Hees obtained Taylor's consulting services, geological and geophysical data, and property through their representations, set forth in the Contract and orally, that they would pay Taylor the consideration set forth therein;

9. In addition, Worth Energy and Hees committed fraud by inducing Taylor to enter into the Contract by representing that certain investor funds were available to finance Worth Energy's drilling of wells;

10. The representations made by Worth Energy and Hees regarding Taylor's compensation as set forth in the Contract, as well as the representations regarding the availability of investor funds, were false;

11. Worth Energy and Hees made these misrepresentations to Taylor with the knowledge that they were false and with the intention of deceiving Taylor. Taylor reasonably relied on those misrepresentations in entering into the Contract and providing her services to Worth Energy and Hees and in undertaking obligations on their behalf;

12. Worth Energy's and Hees' misrepresentations to Taylor, made to induce her to provide property and services, were made willfully, maliciously, intentionally, and deliberately, so as to injure Taylor and her property;

13. As a direct and proximate result of (a) her reliance on the misrepresentations of Worth Energy and Hees, and (b) the injuries inflicted upon Taylor by the willful, malicious, intentional, and deliberate acts of Worth Energy, Hees, and

Howard, Taylor has suffered damages in the sum of Five Hundred Seventy-Five Thousand One Hundred Twenty Nine and 54/100 Dollars ($575,129.54);

14. Worth Energy, Hees and Howard are liable to Taylor, jointly and severally, for prejudgment interest at the rate of ten percent (10%) compounded daily from January 1, 1985 through February 27, 1989, which amount is Two Hundred Ninety-Six Thousand Five Hundred Fifty-Six and 01/100 Dollars ($296,556.01); and

15. Worth Energy, Hees and Howard are liable to Taylor, jointly and severally, for attorneys' fees in the trial court in the amount of One Hundred Seventy-Five Thousand Dollars ($175,000.00), incurred in connection with Taylor's claim for breach of contract. Moreover, such attorneys' fees are recoverable for the fraudulent and tortious actions of Worth Energy and Hees inasmuch as the trial of Taylor's fraud and tort actions against Worth Energy and Hees was so intertwined with the trial of her contract action as to render such actions inseparable. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover of and from MBank the additional sum of Sixty-Five Thousand Dollars ($65,000.00) as reasonable attorneys' fees in the event

that MBank takes an appeal from this Judgment to the Court of Appeals. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover of and from MBank the additional sum of Fifteen Thousand Dollars ($15.000.00) as reasonable attorneys' fees in the event that an application for writ of error is filed in the Supreme Court of Texas. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover, jointly and severally from the appealing party or parties, the additional sum of Sixty Five Thousand Dollars ($65,000.00) as reasonable attorneys' fees in the event that Worth Energy, Hees, or Howard, takes an appeal from this Judgment to the Court of Appeals. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover, jointly and severally from the appealing party or parties, the additional sum of Fifteen Thousand Dollars ($15,000.00) as reasonable attorneys' fees in the event that an application for writ of error is filed in the Supreme Court of Texas by Worth Energy, Hees, or Howard. Further, it is

ORDERED, ADJUDGED AND DECREED that MBank take nothing on its claims for deficiency on the note secured by Taylor's Jaguar, on its claims for attorneys' fees, on its claims for breach of the settlement agreement, on its claims for fraud and misrepresentation, and on its claims for exemplary damages. Further, it is

ORDERED, ADJUDGED AND DECREED that Worth Energy take nothing by way of its First Amended Original Petition and that all relief prayed for therein is denied. Further, it is

ORDERED, ADJUDGED AND DECREED that all relief which is not specifically granted in this Judgment should be, and is hereby denied. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor is entitled to all writs and processes for the enforcement and collection of this Judgment allowed by law, including, but not limited to, the right to levy against the property of MBank, Worth Energy, Hees, or Howard, and recovery of all costs of Court allowed by law for the collection of this Judgment. Further, it is

ORDERED, ADJUDGED AND DECREED that all amounts awarded in this Judgment shall bear interest at the rate of ten percent per annum (10%) from the date of this Judgment until paid. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover costs of Court from MBank, Worth Energy, Hees, and Howard, jointly and severally.

SIGNED this 27 day of February, 1989.

/s/ Jack O'Neill
JACK O'NEILL
DISTRICT JUDGE

APPROVED AS TO FORM:

BUTLER & BINION

By: _____

Hayden Burns
State Bar No. 0345600

J. Burke McCormick
State Bar No. 13460300

1600 First Interstate
Bank Plaza
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(713) 237-3622

ATTORNEYS FOR SUZAN E. TAYLOR
D/B/A EXPLORATION SERVICES

FULBRIGHT & JAWORSKI

By: _____

James C. Slaughter
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(713) 651-1551

ATTORNEYS FOR MBANK HOUSTON, N.A.

APPENDIX D

NO. 85-29591-A

MBANK GREENS PARKWAY, N.A. and WORTH ENERGY CORPORATION, Plaintiffs,	§	IN THE DISTRICT COURT OF
v.	§	
SUZAN E. TAYLOR D/B/A EXPLORATION SERVICES, Defendant, Counter-Plaintiff, and Third Party Plaintiff,	§	HARRIS COUNTY, TEXAS
v.	§	
WORTH OPERATING, INC., AARON W. HEES, and JIM W. HOWARD Third Party Defendants.	§	152ND JUDICIAL DISTRICT

ORDER

Came on to be heard the motion of Defendant, Counter-Plaintiff and Third Party Plaintiff, SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES ("Taylor"), for entry of judgment against Plaintiff and Counter-Defendant MBank Houston, N.A., as successor-in-interest to MBank Greens Parkway, N.A.

and MBank Greenspoint, N.A. ("MBank"), Plaintiff and Counter-Defendant Worth Energy Corporation ("Worth Energy"), and Third Party Defendants Aaron W. Hees ("Hees") and Jim W. Howard ("Howard"). The Court, after hearing the evidence presented at trial and the argument of counsel, and after reviewing the verdict of the Jury, entered Judgment on February 27, 1989. The Court recognizes that enforcement of this Judgment is controlled by 12 U.S.C. § 91. It is therefore

ORDERED that, with respect to MBank only, Taylor shall not execute upon this Judgment, attach or garnish any property of MBank, or otherwise enjoin MBank without leave of this Court. Further, it is

ORDERED that Taylor may immediately file an Abstract of this judgment. The District Clerk shall immediately prepare such abstract if requested to do so by Taylor or her counsel.

SIGNED this 1st day of March, 1989.

/s/ Jack O'Neill
JACK O'NEILL
DISTRICT JUDGE

APPROVED AS TO FORM:

BUTLER & BINION

By: /s/ Hayden Burns
Hayden Burns
State Bar No. 03456000

J. Burke McCormick
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ATTORNEYS FOR SUZAN E. TAYLOR
D/B/A EXPLORATION SERVICES

FULBRIGHT & JAWORSKI

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ATTORNEYS FOR MBANK HOUSTON, N.A.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-89-0672
SUZAN E. TAYLOR d/b/a	§	
EXPLORATION SERVICES and	§	
MBANK HOUSTON, N.A.	§	
	§	
Defendant.	§	

ORDER

Upon consideration of the motion of the United States for a temporary restraining order; good cause having been shown; and the Court finding that:

(1) unless defendants are temporarily restrained, irreparable injury will result because a violation to an Act of Congress will likely occur;

(2) the immediacy of the threatened irreparable injury precludes waiting until regular notice and an opportunity to be heard can be given to defendants; and

(3) in view of the likely irreparable injury, the public interest favors granting a temporary restraining order;

it is by the Court therefore

ORDERED that the motion of plaintiff United States of America for a temporary restraining order be, and the same hereby is, granted; and it is

FURTHER ORDERED that defendant SUZAN E. TAYLOR d/b/a Exploration Services (Taylor) shall forthwith take all necessary steps to withdraw any and all abstracts of judgment or judgment liens issued in the state proceeding *MBank Greens Parkway, N.A. et al. v. Suzan E. Taylor d/b/a Exploration Services et al.*, No. 85-29591-A, District Court, Harris County, Texas; and it is

FURTHER ORDERED that for the duration of this Order all abstracts of judgment or judgment liens issued in the aforementioned Texas state proceeding commanding lienee to preserve the assets of MBank Houston, N.A. (MBank) shall have no force or effect; and it is

FURTHER ORDERED that during the pendency of the Order, defendant Taylor, including her attorneys, agents, and all other persons or entities acting on her behalf or in concert with her, are enjoined from obtaining, seeking to obtain, enforcing or seeking to enforce any writs of attachment, writs of garnishment, abstracts of judgment, judgment liens or executions upon a judgment sought, filed, or entered in connection with the aforementioned Texas state proceeding, including attempts at enforcement by

seeking to hold third parties or MBank in contempt of state court orders, declared herein to be temporarily of no force or effect; and it is

FURTHER ORDERED that for the duration of this Order defendant MBank is prohibited from participating in any of the foregoing actions forbidden defendant Taylor and all other persons or entities acting on her behalf.

IT IS SO ORDERED.

SIGNED this 1st day of March, 1989 at 11:35 a.m.

/s/ James DeAnda
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-89-0672
	§	
	§	
SUZAN E. TAYLOR d/b/a	§	
EXPLORATION SERVICES AND	§	
MBANK HOUSTON, N.A.	§	

ORDER

On the 17th day of April 1989, the Court heard the motion for contempt filed by the Federal Deposit Insurance Corporation as Receiver and by Deposit Insurance Bridge Bank and the arguments of counsel. The Court is of the opinion that the Notice Regarding Abstract of Judgment filed by Suzan E. Taylor does not comply with this Court's Order dated March 21, 1989. It is therefore

ORDERED that Taylor or her counsel sign and file for record the Release of Abstract of Judgment attached to this Order as Exhibit A no later than April 24, 1989. If said Release of Abstract of Judgment is not signed and filed for record as of April 24, 1989, Taylor will be in contempt of this Court's Order and the Court will impose sanctions of

$5,000.00 a day on Taylor until there is compliance with this Order.

Counsel for Taylor has requested the Court to stay this Order pending Taylor's appeal of this Court's Order of March 21, 1989, and of this Order. Said request is DENIED.

DONE in Houston, Texas, this 18th day of April, 1989.

/s/ James De Anda
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

RELEASE OF ABSTRACT OF JUDGMENT

WHEREAS, on March 1, 1989, that certain Abstract of the Judgment rendered in the 152nd Judicial District Court of Harris County, Texas, in a state court action styled *MBank Greenway* [sic] *Parkway, N.A. et al v. Suzan E. Taylor d/b/a Exploration Services*, Cause No. 85-29591-A ("Taylor State Proceedings"), in favor of Suzan E. Taylor d/b/a Exploration Services, was filed for record in the Official Public Records of Real Property of Harris County, Texas, under Clerk's File No. M062931 and recorded under Film Code No. 141-62-0562;

WHEREAS, pursuant to that certain Memorandum and Order dated March 21, 1989 of the United States District Court for the Southern District of Texas, Houston Division, in a federal court action styled *United States of America v. Suzan E. Taylor d/b/a Exploration Services and MBank Houston, N.A.*, Civil Action No. H-89-0672, it was ordered that for the duration of the Order, all abstracts of judgment or judgment liens issued against MBank Houston, N.A. in the Taylor State Proceedings shall have no force and effect;

WHEREAS, the United States District Court for the Southern District of Texas, ordered Taylor on April 17, 1989, to sign this Release of Abstract of Judgment.

NOW, THEREFORE, pursuant to the Orders of the United States District Court, Southern District of Texas, Houston Division, as aforesaid, the undersigned, the legal owner and holder of the

judgment which is the subject of the Abstract of Judgment and of the liens created in the Abstract of Judgment, hereby fully RELEASES any and all liens and other claims created by the Abstract of Judgment.

It is expressly understood that this Release is not a release, satisfaction or discharge of the judgment entered by the District Court of Harris County, Texas, 152nd Judicial District Court of Harris County, Texas in Cause No. 85-29591-A, styled *MBank Greens Parkway, N.A., et al v. Suzan E. Taylor d/b/a Exploration Services.*

EXHIBIT A

WITNESS the execution hereof effective March 1, 1989.

SUZAN E. TAYLOR D/B/A
EXPLORATION SERVICES

OR

HAYDEN BURNS, as Attorney for
Suzan E. Taylor d/b/a
Exploration Services

STATE OF TEXAS §
§
COUNTY OF HARRIS §

This instrument was acknowledged before me on this _____ day of April, 1989, by _____.

_____
Notary Public - State of Texas

My Commission Expires:

_____ _____
(Printed Name of Notary)

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-2373
(D.C.#CA-H-89-0672)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SUZAN E. TAYLOR, d/b/a
EXPLORATION SERVICES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before GEE, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant for stay pending appeal is DENIED.

The parties are requested to undertake to agree upon a briefing schedule which will bring the merits of the case before the Court as soon as practicable.

The Clerk will establish a briefing schedule based upon such agreement or upon negotiations with the parties.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-2328 and 89-2373

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THE FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for MBank Houston, N.A. and The Deposit Insurance Bridge Bank, N.A.,

Intervenors-Appellees,

versus

SUSAN E. TAYLOR, d/b/a EXPLORATION SERVICES,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(September 26, 1989)

Before CLARK, Chief Judge, JOHNSON and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge

APPENDIX I

FOR THE FIFTH CIRCUIT

No. 89-2328 and
89-2373

D. C. Docket No. CA-H-89-0672

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

The FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for MBank Houston, N.A. and The Deposit Insurance Bridge Bank, H.A., Intervenor-Appellees

v.

Suzan E. TAYLOR d/b/a Exploration Services, Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

Before CLARK, Chief Judge, JOHNSON and SMITH, Circuit Judges.

JUDGMENT

These causes came on to be heard on the record on appeal and were argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court and the judgment and order of the District Court in these causes are affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee and intervenors-appellees the costs on appeal, to be taxed by the Clerk of this Court.

August 28, 1989

ISSUED AS MANDATE:

OP-JDT-11

NO. 89-909

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
Petitioner

v.

UNITED STATES OF AMERICA, THE FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for MBANK HOUSTON, N.A., and BANK ONE, TEXAS, N.A.,
Respondents

BRIEF OF RESPONDENT BANK ONE, TEXAS, N.A., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly ruled that the creation of a lien to secure a non-final judgment against a national bank by means of the Texas procedure for abstracting a trial court judgment is an attachment or injunction prohibited by 12 U.S.C. § 91.

2. Whether the Court of Appeals correctly ruled that the flat prohibition against attachments or injunctions against the property of national banks contained in 12 U.S.C. § 91 authorized the district court to enjoin a violation of that prohibition without analysis of the balance of harms or the public interest.

3. Whether the Court of Appeals correctly ruled that the United States had standing to seek an injunction against a violation of 12 U.S.C. § 91 on behalf of the Comptroller of the Currency because of the federal government's interest in the safety and soundness of the national banking system.

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NO. 89-909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SUZAN E. TAYLOR d/b/a
EXPLORATION SERVICES,
Petitioner

v.

UNITED STATES OF AMERICA, THE
FEDERAL DEPOSIT INSURANCE CORPORATION
as Receiver for MBANK HOUSTON, N.A.,
and BANK ONE, TEXAS, N.A.,
Respondents

BRIEF OF RESPONDENT BANK ONE, TEXAS, N.A., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT

The statement contained in the Petition [by and large] correctly recites most of the facts necessary for this Court to consider and deny the Petition. Respondent BANK ONE, TEXAS, N.A., respectfully submits the following

statement to correct the few inaccuracies and omissions that are reflected in Petitioner's factual statement.

MBank Houston, N.A., timely filed a motion for new trial after entry of judgment in favor of Petitioner in the companion state court proceedings. On March 28, 1989, the Office of the Comptroller of the Currency declared MBank Houston, N.A., insolvent and appointed the Federal Deposit Insurance Corporation its Receiver. The Federal Deposit Insurance Corporation, acting in its capacity as Receiver for MBank Houston, N.A. ("FDIC-Receiver"), then removed the state court proceeding in which the judgment was entered to the United States District Court for the Southern District of Texas, where the motion for new trial is currently pending along with other matters. As the sole proper party defendant in that ongoing civil action separate and apart from this case, the FDIC-Receiver is pursuing the motion for new trial and otherwise seeking to overturn the judgment on the merits.

On the same day that it was appointed receiver, the FDIC-Receiver conveyed certain assets of the closed MBank Houston, N.A., to Deposit Insurance Bridge Bank, N.A., including all the real estate assets of the closed bank in Harris County, Texas. The bridge bank was created by the Federal Deposit Insurance Corporation pursuant to 12 U.S.C. § 1821(i), as that subsection of the Federal Deposit Insurance Act then provided. The bridge bank has since been renamed BANK ONE, TEXAS, N.A., and will henceforth be referred to as BANK ONE.

Returning to the circumstances of this case, after entry of the preliminary injunction by the district court on March 21, 1989, ordering Petitioner to take "all necessary

steps" to withdraw her abstract of judgment, Petitioner filed on March 22 what she called a Notice Regarding Abstract of Judgment in the real property records of Harris County. The notice, however, merely mentioned the terms of the March 21 order, stated that Petitioner was making the filing involuntarily and advised that she would appeal the March 21 order. This notice, of course, had no practical effect on the abstract of judgment, so that BANK ONE found itself unable to convey clear title to the real estate that it had purchased from the FDIC-Receiver. After the FDIC-Receiver and BANK ONE substituted as parties for the closed bank, therefore, they were forced to seek further relief, which the district court ultimately granted, requiring Petitioner under threat of sanctions to release and effectively withdraw her abstract of judgment in Harris County.

SUMMARY OF REASONS FOR DENYING THE WRIT

The only conceivable reason for granting a writ in this case would be the importance of the questions of federal law raised in the petition. Because these admittedly important questions have long been settled by this Court and because the decision of the Court of Appeals in no way conflicts with the settled authority of this Court, however, there is in fact no reason for granting the writ.

1. This Court has long since established that the applicable provisions of 12 U.S.C. § 91 prohibiting attachments or injunctions against the assets of national banks are not to be read or applied literally, but are to be construed to fulfill the central purpose of that statute, which is to prevent creditors of national banks from

obtaining court-assisted preference over other creditors. The Court of Appeals faithfully followed this settled precedent in determining that the Texas procedure for creating a lien by abstracting a judgment—because it is the functional equivalent of an attachment, has the effect of an injunction, and is designed to secure a preferential lien on behalf of a judgment creditor—is a procedure that may not be applied against the assets of a national bank under 12 U.S.C. § 91.

2. It is settled law of this Court that if a statute contains a flat prohibition against certain conduct, a court may enjoin that conduct without analyzing the traditional factors of the balance of the harms or the effect on the public interest caused by such an injunction. Again the Court of Appeals faithfully applied this settled precedent in holding that the flat prohibition of 12 U.S.C. § 91 entitled the district court in this case to enjoin Petitioner from abstracting her judgment against the assets of a national bank without expressly analyzing the balance of harms or the public interest.

3. Because Respondents FDIC-Receiver and BANK ONE have standing to obtain and did obtain the critical relief that resulted in effective withdrawal of Petitioner's illegal abstract of judgment, the standing of the United States is a merely academic issue. In any event, it is well settled law of this Court that, even in the absence of express legislative authorization, the United States may have sufficient interest in a particular dispute to accord the federal government standing to seek an injunction against violations of federal law. The Court of Appeals followed this authority, as well as its own established precedent in this particular context, in ruling that the United States, acting on behalf of the Comptroller of

the Currency, has standing to seek to enjoin violations of 12 U.S.C. § 91 because of the federal government's interest in the safety and soundness of the national banking system.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals does not create a conflict in the circuits, and Petitioner does not contend that it does. Indeed, Petitioner's opening argument for granting the writ appears to be that this Court should always review decisions involving the FDIC. Petition, pp. 7-8. Of course, this has not been the judgment of this Court, for with respect to the Fifth Circuit's leading decision under 12 U.S.C. § 91—the most comparable case to the present case, although clearly of much wider significance —this Court has most recently denied certiorari. *United States v. LeMaire,* 826 F.2d 387 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 1223 (1988).

The questions of law posed by the Petition, especially as restated above, are clearly of great importance. Indeed, the current Congress considered the type of prohibition exemplified by 12 U.S.C. § 91 to be so important to the safety and soundness of the nation's banking and thrift systems that it enacted, as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, a nearly identical provision stating that "[n]o attachment or execution may issue by any court upon assets in the possession of the receiver." 12 U.S.C. § 1821(d)(13)(C) (referring to bank receiverships of the FDIC, and by reference, 12 U.S.C. § 1421A(b)(4), savings institution receiverships of the newly created Resolution Trust Corporation). Of equal importance is the principle that violations of these flat prohibitions against

court-assisted preferences for financial institution creditors may be and should be enjoined without express consideration of the balance of harms or the public interest. For these reasons, had the Court of Appeals reached decisions in conflict with the settled decisions of this Court on these two issues, BANK ONE would have been the first to argue that this case would be worthy of consideration by this Court.

As explained in detail in the following sections of this brief, however, the law of this Court relating to these issues is well settled. And the Court of Appeals did not depart in any manner from the controlling decisions of this Court on these subjects. Accordingly, there is no reason for this Court to review the decision of the Court of Appeals in this case. This Court should therefore deny the writ.

1. The Court Of Appeals Correctly Held Under Settled Precedent Of This Court That An Abstract Of Judgment Under Texas Law Is An Attachment Or Injunction Within The Meaning Of 12 U.S.C. § 91 That May Not Legally Be Employed Against The Assets Of A National Bank.

In *Third Nat'l Bank v. Impac Ltd., Inc.*, 432 U.S. 312 (1977), this Court analyzed the applicable provisions of 12 U.S.C. section 91 and reviewed the three other decisions of this Court which analyzed those provisions. *Van Reed v. People's Nat'l Bank of Lebanon*, 198 U.S. 554 (1905); *Earle v. Pennsylvania*, 178 U.S. 449 (1900); and *Pacific Nat'l Bank v. Mixter*, 124 U.S. 721 (1888). The *Impac* Court acknowledged that in its earliest construction of the statute in *Mixter*, the Court had reached

the conclusion that "the provision was evidently made to secure equality among the general creditors in the . . . property of an insolvent bank." 124 U.S. at 727, *quoted in Impac at* 432 U.S. at 319. Likewise, the *Impac* Court noted that the Court in *Earle* had reached a similar conclusion "that the ban on prejudgment writs must 'be construed in connection with the previous parts of the same section' concerning preferential transfers." 432 U.S. at 320, *quoting* 178 U.S. at 453. Finally, the *Impac* Court acknowledged that the "holding in *Earle* forecloses a completely literal reading of the statute." 432 U.S. at 320. It is therefore settled by this analysis in *Impac* that application of section 91 may not be limited to the literal remedies specified in the statute (and familiar to the Congress which enacted the statute in 1873), but must extend coverage of the statute so as to fulfill the underlying purpose of the "ban on prejudgment writs" by applying it to all such remedies that state legislators might devise which would assist bank creditors in gaining an unequal, preferential recovery against bank assets. *See United States v. LeMaire,* 826 F.2d 387, 389-90 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 1223 (1988).

The decision of the Court of Appeals in this case unquestionably follows this settled construction of section 91 and correctly applies it to the facts of this case. The Court of Appeals acknowledged first this Court's ruling in *Impac* "that section 91 is not to be given a completely literal meaning." Petition, A-5. Next the Court of Appeals correctly identified the purpose of section 91, "which is to prevent creditors from obtaining preferential treatment by court action, including the securing of a judgment at the trial-court level." Petition, A-5, *quoting LeMaire, supra,* 826 F.2d at 390. The Court of Appeals

had already determined that "under Texas law an abstract of judgment is functionally equivalent to an attachment" because they both create liens and "is also similar to an injunction in that the lien created by an abstract of judgment prohibits a national bank from freely transferring its property." Petition, A-5. It therefore concluded that, because by abstracting her judgment Petitioner "would secure preferential treatment over the other general creditors of MBank," her "action prior to a final judgment would violate" section 91. Petition, A-5-6. This conclusion in no way conflicts with applicable decisions of this Court.

Petitioner concedes the functional equivalency of an attachment and abstract of judgment by noting that "neither a writ of attachment nor a judgment lien seizes real property." Petition, p. 11. Petitioner, moreover, does not dispute that her action would have created a preference in her favor over the other general creditors of MBank in contravention of the purpose of section 91. Instead, Petitioner attempts to rely on the fact that creditors may obtain a preference through consensual liens or other consensual agreements. Petition, pp. 10-11. Section 91, of course, ~~does not~~ purport to prohibit consensual liens or consensual security agreements, unless those liens or agreements are undertaken in contemplation of insolvency. The lien sought by Petitioner was, however, not one of those consensual liens that are not prohibited by section 91. Her judgment lien would have been, for all practical purposes and under all policy considerations, identical to a prohibited attachment or injunction, as the Court of Appeals concluded.

In order not to conflict with the settled holding of this Court under section 91, therefore, the Court of Appeals had no choice but to rule that a Texas abstract of judg-

ment against a national bank is prohibited by section 91. There is no reason to grant the writ on the basis of the Court of Appeals' entirely proper ruling under 12 U.S.C. § 91.

2. The Court Of Appeals Correctly Held Under Settled Precedent Of This Court That The Flat Prohibition Of 12 U.S.C. § 91 Authorized The District Court To Enjoin A Violation Of The Statute Without Express Consideration Of The Balance Of Harms Or The Public Interest.

In *Amoco Production Co. v. Village of Gambell,* 480 U.S. 531 (1987), this Court reviewed the law governing the circumstances in which a district court may or should enjoin a violation of a federal statute, and acknowledged that in certain cases Congress may have "intended to deny courts their traditional equitable discretion." *Id.* at 543. The Court further acknowledged that its decision in *TVA v. Hill,* 437 U.S. 153 (1978), remained the leading precedent for the proposition that certain statutory violations must be enjoined without application of traditional equitable considerations. 480 U.S. at 543 n.9. There, as acknowledged by the Court in *Village of Gambell,* the Court concluded that the "flat ban on destruction of critical habitats" contained in the Endangered Species Act required a federal court to enjoin the construction of a dam that would have destroyed the habitat of the snail darter. *Id., citing TVA v. Hill, supra.* It is therefore settled by this Court that a flat statutory ban on certain conduct may require issuance of an injunction to block that conduct.

In this case, the Court of Appeals held that "the district court correctly concluded that the purpose of section 91

—to prevent a creditor from obtaining preferential treatment prior to a final judgment—requires injunctive relief once a statutory violation has been shown." Petition A-6-7. Again, this holding by the Court of Appeals in no way conflicts with settled precedent of this Court on this subject.

Petitioner simply ignores *TVA v. Hill,* and as noted above, likewise ignores the reasons for the statutory ban of section 91. Petition, pp. 13-14. There is simply no reason to grant the writ on this settled issue, on which the Court of Appeals scrupulously followed the leading decision of this Court.

3. The FDIC-Reciever And BANK ONE Had Undoubted Standing, And The Court Of Appeals Correctly Held Under Settled Precedent Of This Court That The United States Had Standing To Seek To Enjoin A Violation Of 12 U.S.C. § 91.

Because the FDIC-Receiver and BANK ONE had clear standing to obtain equitable relief against Petitioner and because these two Respondents appropriately obtained the effective relief forcing Petitioner to withdraw her abstract of judgment, the standing of the United States initially to have sought the same relief has clearly become a moot point. On this ground alone, the standing issue does not warrant this Court's review.

In any event, decisions of this Court have long established that the United States has standing in a variety of circumstances to obtain equitable relief when interests of the federal government are at stake. *In re Debs,* 158 U.S. 564, 584 (1885). Of course, as this Court held in *United States v. San Jacinto Tin Co.,* 125 U.S. 273 (1888), the United States does not have standing to

pursue purely private interests. The holding in *San Jacinto Tin* does not govern this case, however, as the Court of Appeals correctly held. In this case, the United States pursued, on behalf of the Comptroller of the Currency, the public's interest in a sound national banking system through enforcement of a key provision of the National Banking Act. The Court of Appeals could not question the standing of the United States on these grounds. Petition, A-3. There is nothing in this conclusion that justifies review by this Court.

CONCLUSION

For the foregoing reasons, there is no valid reason to grant the writ. The Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Brief of Respondent BANK ONE, TEXAS, N.A., in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been forwarded by messenger to Messrs. Robert Hayden Burns and J. Burke McCormick, Butler & Binion, 1600 First Interstate Plaza, 1000 Louisiana, Houston, Texas 77002, and by United States mail, postage prepaid to Ms. Margaret Hewing and to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 on this 2nd day of February, 1990.

Robert D. Daniel

ROBERT D. DANIEL

No. 89-909

In the Supreme Court of the United States

OCTOBER TERM, 1989

SUZAN E. TAYLOR, d/b/a EXPLORATION SERVICES,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. 91 prohibits a state judgment creditor from filing an abstract of judgment against the property of a national bank prior to the exhaustion of appellate remedies.

2. Whether the United States has standing to bring this action to enjoin a violation of the national banking laws on behalf of the Comptroller of the Currency, who is charged with the execution of those laws.

3. Whether the court of appeals properly upheld a preliminary injunction under 12 U.S.C. 91 on the basis that the statute necessarily required injunctive relief as a remedy for a violation.

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TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1989

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SUZAN E. TAYLOR, d/b/a EXPLORATION SERVICES,
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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 881 F.2d 207. The orders of the district court (Pet. App. B1-B10, F1-F6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1989. A petition for rehearing was denied on September 26, 1989. Pet. App. H1-H2. The petition for a writ of certiorari was filed on December 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 27, 1989, petitioner obtained a $9.6 million judgment against MBank Houston N.A. (MBank), in a Texas state district court. MBank then moved for an order prohibiting petitioner from filing an abstract of the judgment while MBank prosecuted an appeal. The state court denied that motion. On March 1, 1989, petitioner filed an abstract of judgment with the Clerk of Harris County, Texas. Under Texas law, the recorded abstract of judgment created a lien on all of MBank's real property located in Harris County, Texas. Pet. App. A2.

On March 1, 1989, the United States, on behalf of the Office of the Comptroller of the Currency (OCC), filed this action for declaratory and injunctive relief under 12 U.S.C. 91, which provides in relevant part that "no attachment, injunction, or execution shall be issued against such [national banking] association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." The district court granted the government's motion for a temporary restraining order prohibiting petitioner from filing an abstract of judgment, but petitioner had succeeded in filing such an abstract nine minutes before the order was signed. Pet. App. A2, E1-E3.

On March 21, 1989, the district court granted the government's motion for a preliminary injunction ordering petitioner to withdraw the abstract of judgment previously filed against MBank. The district court explained that 12 U.S.C. 91 was enacted to prevent a state judgment creditor from obtaining a preference over other creditors of a national bank prior to final judgment. Based on its finding that petitioner had achieved such a preference by filing her abstract of judgment, the court held that an injunction requiring petitioner to withdraw the abstract of judgment was necessary to effectuate the purposes of the statute. Pet. App. B4, B7-B9.

On March 28, 1989, the Comptroller declared MBank insolvent and appointed the FDIC its receiver. The FDIC as receiver conveyed all of MBank's real estate in Harris County, Texas, to Federal Deposit Bridge Bank, N.A. (Bridge Bank), which has since been renamed Bank One, Texas, N.A. Upon the motion of the FDIC as receiver and Bridge Bank, the district court on April 18, 1989, ordered petitioner to release unconditionally her abstract of judgment by April 24, 1989, or be held in contempt. Pet. App. A3 n.1, F1-F6.[1]

2. Petitioner appealed both the preliminary injunction and the order requiring release of her abstract of judgment. Pet. App. A3. The court of appeals affirmed both orders, holding that 12 U.S.C. 91 prohibits a state judgment creditor from filing a Texas "abstract of judgment" against the property of a national bank prior to the completion of the appellate process. Pet. App. A5-A6.

The court of appeals initially determined that the United States had standing to bring this action. The court noted that the OCC has a supervisory and regulatory interest in enforcing the national banking laws, including 12 U.S.C. 91. That interest "provides sufficient standing for the United States to bring this action." Pet. App. A3 (citing *United States* v. *Lemaire*, 826 F.2d 387, 388 & n.1 (5th Cir. 1987), cert. denied, 485 U.S. 960 (1988)).

Next, the court of appeals held that although 12 U.S.C. 91 does not refer by name to abstracts of judgment, under Texas law an abstract of judgment is the functional equivalent of an "attachment" or an "injunction," both of which are specifically prohibited by Section 91. The court

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[1] The court declined to consolidate the trial on the merits with the hearing on the preliminary injunction motion, because petitioner claimed that the United States had "conspir[ed]" with MBank to prevent her from filing her abstract of judgment, and the court deemed it "inequitable" to consider that claim on the government's motion for preliminary relief. Pet. App. B3, B5, B9.

explained that Section 91 must be read to effectuate the statutory purpose of preventing state judgment creditors of a national bank from obtaining preferential treatment prior to final judgment. Petitioner's abstract of judgment would allow her to obtain such preferential treatment; hence, ordering her to withdraw it fulfills the policies underlying 12 U.S.C. 91. Pet. App. A5-A6.

Finally, the court rejected petitioner's argument that the district court was required to consider competing assertions of harm and the public interest before granting a preliminary injunction. The court reasoned that where a statutory violation is established and the statute "by necessary and inescapable inference requires injunctive relief," the violation may be enjoined without proof of the injury and public interest factors generally required for an injunction. Pet. App. A6. Applying those principles, the court concluded that Section 91's policy of preventing state judgment creditors from obtaining preferential treatment prior to final judgment "requires injunctive relief once a statutory violation is shown." Pet. App. A7.

ARGUMENT

1. Petitioner first contends (Pet. 8-12) that the court of appeals incorrectly interpreted the nature and effect of an abstract of judgment under Texas law in holding that an abstract of judgment is equivalent to an attachment or injunction and is, therefore, prohibited by 12 U.S.C. 91. To the extent that petitioner challenges the court's interpretation of Texas law, review by this Court is not warranted, because this Court has "a settled and firm policy of deferring to the regional courts of appeals in matters that involve the construction of state law." *Bowen* v. *Massachusetts*, 108 S. Ct. 2722, 2739 (1988); *Frisby* v. *Schultz*, 108 S. Ct. 2495, 2500 (1988); *Virginia* v. *American Booksellers Ass'n*,

484 U.S. 383, 395 (1988); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979).

At all events, the court of appeals' decision is correct. 12 U.S.C. 91 expressly prohibits any "attachment, injunction, or execution" against a national bank prior to final judgment. This Court long ago held that prejudgment attachments against national banks violate Section 91. *Van Reed* v. *People's Nat'l Bank*, 198 U.S. 554, 558-559 (1905); *Pacific Nat'l Bank* v. *Mixter*, 124 U.S. 721, 726 (1888). In this case, the court held that an abstract of judgment is prohibited by Section 91 since, under Texas law, an abstract of judgment is identical in effect to an attachment of real property. See Pet. App. A5 (citing *Stewart* v. *Rockdale State Bank*, 52 S.W.2d 915, 916 (Tex. Civ. App. 1932), aff'd, 124 Tex. 431, 79 S.W.2d 116 (1935)).

Petitioner's argument that an "abstract of judgment" is not barred by Section 91 because that provision does not specify such a procedure by name is without merit. If accepted, that argument would open a loophole for creditors to take advantage of any state procedure that has the identical effect as an "attachment," 'injunction," or "execution," but is simply called by a different name under local law.[2] Such an interpretation would prevent the uniform applica-

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[2] As this case illustrates, that possibility is hardly academic. See also 11 *West's Legal Forms* § 15.1, at 4 (2d ed. 1984) ("It should be noted that there is considerable variation in nomenclature among the states. For example, what is called [an] attachment in one state may be referred to as [a] garnishment in another."). Compare *Dames & Moore* v. *Regan*, 453 U.S. 654, 675 n.7 (1981) (quoting W. Shakespeare, *Romeo and Juliet*, Act II, scene 2, line 43). While an attachment is ordinarily used before judgment, it is analogous to various postjudgment remedies, such as the remedy used here. See 11 *West's Legal Forms*, *supra*, § 16.91, at 207-208 (discussing procedure of filing an abstract of judgment in order to obtain a judgment lien).

tion of Section 91 to banks located in different states—a result that Congress could not have intended. Here, an abstract of judgment under Texas law creates a judgment lien that prevents the free transfer of the judgment debtor's property. It therefore immobilizes the property in the same manner as an attachment or injunction, both of which are expressly prohibited by Section 91. Just as an attachment against a national bank violates Section 91, an equivalent procedure under state law, such as filing an abstract of judgment, also violates that statute.[3]

Petitioner relies (Pet. 11) on *Third Nat'l Bank* v. *Impac Ltd.*, 432 U.S. 312, 320 (1977), for the proposition that 12 U.S.C. 91 applies only to state procedures "that accomplish a seizure of property." That reliance is misplaced. In that case, the Court held that Section 91's prohibition on prejudgment procedures applies only to actions "by creditors of the bank" and does not apply to actions seeking to "seize property belonging to others which happens to be in the hands of the bank." 432 U.S. at 323-324. In focusing on the distinction between creditors of the bank and other parties, the Court did not consider what forms of process are covered in cases where Section 91 is applicable, let alone limit Section 91's coverage to cases involving a direct, physical "seizure" of property. Indeed, if anything, the reasoning of the Court points in exactly the opposite direction.[4]

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[3] Petitioner's claim that the decision below conflicts with the district court decision in *United States* v. *Theos*, 709 F. Supp. 1007 (D. Colo. 1989), does not warrant this Court's attention. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.8, at 207-208 (6th ed. 1986).

[4] The Court, in noting that Congress intended in Section 91 "to prevent state judicial action, prior to final judgment, which would have the effect of seizing the bank's property," observed that before Section 91 was passed, it was "not unknown" for creditors to use "injunctions

At all events, petitioner's argument that only physical "seizures" are embraced by Section 91 proves too much. If petitioner's argument were correct, Section 91 would not apply to an "attachment" of real estate under Texas law, because, as petitioner concedes (Pet. 11), the attachment of real estate in Texas does not involve physical seizure. But the plain language of Section 91 covers such "attachments," and there is nothing in the statute's language or underlying policies that would support the narrowing construction urged by petitioner.

Contrary to petitioner's argument (Pet. 10-11), the preliminary injunction in this case was not based on the view that 12 U.S.C. 91 prohibits all preferences against a national bank. Both the district court and the court of appeals correctly recognized that Section 91 prevents creditors of national banks from obtaining preferences *prior to final judgment*. Pet. App. A5, B7-B8. Petitioner's judgment, prior to the exhaustion of an appeal, was not final for purposes of Section 91. *United States* v. *Lemaire*, *supra*. Thus, Section 91's prohibition on preferences was directly applicable. The cases cited by petitioner to illustrate that Section 91 does not bar all preferences are inapposite, since none involved preferences asserted prior to final judgment. See Pet. 10-11 (citing *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 566-567 (1934); *Merrill* v. *National Bank*, 173 U.S. 131, 144-145 (1899); *Scott* v. *Armstrong*, 146 U.S. 499, 509-510 (1892)).

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before final judgment" against the transfer of property by banks to effect such seizures. *Third Nat'l Bank*, 432 U.S. at 323 & n.18. Although such injunctions did not involve the physical seizure of property, they still had the effect of immobilizing the bank's property by restraining its transfer – just as did the "abstract of judgment" here. Pet. App. A5 (noting that the abstract of judgment here was "similar to an injunction" because it "prohibits a national bank from freely transferring its property").

2. Petitioner next claims that the United States lacks standing to bring this action. That contention is without merit. This Court has long recognized the standing of the United States to bring actions designed to prevent interference with its powers and functions. *United States* v. *American Bell Telephone Co.*, 128 U.S. 315 (1888); *In re Debs*, 158 U.S. 564 (1895); *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 201-204 (1967). The OCC's valid interest in enforcing one of the banking laws intended to protect national banks clearly provides sufficient standing for the United States to bring this action. See *United States* v. *Lemaire*, 826 F.2d at 388 & n.1; *Federal Home Loan Bank Bd.* v. *Empie*, 778 F.2d 1447, 1450 (10th Cir. 1985).

As petitioner acknowledges (Pet. 12), the OCC supervises and regulates the national banking system. If a national bank violates applicable law or persists in unsafe and unsound banking practices, the Comptroller has the authority to issue cease and desist orders, to impose civil money penalties, to remove officers and directors pursuant to statutory procedures, 12 U.S.C. 1818, or to appoint a conservator for the bank, 12 U.S.C. 203. The Comptroller also has the authority to conduct bank examinations, 12 U.S.C. 481, and to appoint a receiver when he is satisfied that a national bank is insolvent. 12 U.S.C. 191. In light of the Comptroller's broad powers to protect the national banking system, the OCC has standing to bring actions to restrain violations of the laws regulating the activities of national banks.

3. Finally, petitioner argues (Pet. 13-14) that the district court had to find irreparable injury and balance the equities before issuing a preliminary injunction in this case. This Court has repeatedly stated that when a party moves to enjoin a statutory violation and the statute by "a necessary and inescapable inference" requires injunctive relief, the

movant need not prove the injury or public interest factors generally required for an injunction. *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 542 (1987); *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978); *United States* v. *City of San Francisco*, 310 U.S. 16, 30-31 (1940). Those principles are fully applicable here.

As the court of appeals explained, the purpose of 12 U.S.C. 91 is to prevent a judgment creditor from obtaining preferential treatment prior to final judgment. Pet. App. A5; see *Lemaire*, 826 F.2d at 387. Because petitioner's abstract of judgment gave her a preference over other creditors prior to final judgment, the court of appeals properly held that an injunction was the only means available to ensure compliance with Section 91. Absent an injunction, the purpose of the statute to free banks from prejudgment restraints on their property would be frustrated. Thus, the policy expressed in Section 91 "by a necessary and inescapable inference," *Amoco*, 480 U.S. at 542, warranted the issuance of the requested injunction upon the showing of a violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 89-909

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
Petitioner,

v.

UNITED STATES OF AMERICA and
THE FEDERAL DEPOSIT
INSURANCE CORPORATION,
as Receiver for MBANK HOUSTON, N.A.
and THE DEPOSIT INSURANCE BRIDGE BANK, N.A.,
Respondents.

REPLY BRIEF OF PETITIONER SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES

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REPLY BRIEF OF PETITIONER SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES

Petitioner, Suzan E. Taylor d/b/a Exploration Services ("Taylor"), files this reply brief addressed to the arguments raised in the briefs in opposition filed by Bank One, Texas, N.A. ("Bank One"), the United States, and the Federal Deposit Insurance Corporation ("FDIC"):

Respondents argue that 12 U.S.C. § 91, a statute prohibiting state courts from issuing prejudgment writs of attachment, injunction, or execution against national banks or their property, precludes a successful plaintiff

from perfecting a judgment lien against a national bank. Respondents further argue that the statute can be enforced by an injunction issued on behalf of the Office of the Comptroller of the Currency ("OCC") without proof that the judgment lien would impact the regulatory interests of the United States or threaten irreparable injury to anyone. These arguments are contrary to the plain language of 12 U.S.C. § 91 and to the settled precedent of this Court.

JUDGMENT LIENS ARE NOT PROHIBITED BY 12 U.S.C. § 91

Because the last clause of 12 U.S.C. § 91 prohibits only writs of attachment, injunction, and execution, Respondents have struggled to find a theory to justify extending the statute's prohibition to judgment liens which are encumbrances imposed by operation of statute and not by judicial writ. The theories propounded by Respondents are sometimes inconsistent, often disingenuous, and are generally premised on the erroneous characterization of an abstract of judgment as a "remedy." Abstracts of judgment, when properly filed, create statutory judgment liens; they do not provide a remedy for the collection or enforcement of a judgment. Tex. Prop. Code Ann. §§ 52.001-.007 (Vernon 1984 & Supp. 1989).

Respondents argue that this Court's admonition in *Third Nat'l Bank v. Impac Ltd.*, 432 U.S. 312 (1977), that 12 U.S.C. § 91 should not be read literally means that the statute's prohibitions can be extended beyond those included in the unambiguous language used by

Congress. What this Court held in *Impac Ltd.* was that 12 U.S.C. § 91 was not to be read literally so as to prohibit bank debtors from protecting their property with prejudgment writs against national banks. 432 U.S. at 316, 320. That holding does not require that the express prohibitions in 12 U.S.C. § 91 be expanded by a non-literal reading of the statute so as to protect national banks from judgment liens perfected by bank creditors.

The items expressly prohibited by the last clause of 12 U.S.C. § 91 are writs that seize property; judgment liens are not mentioned. Such liens were first introduced to the English legal system by a statute passed in the thirteenth century and were perfected in some of the American colonies prior to the Declaration of Independence. 49 C.J.S. *Judgments* § 454 (1947). Opinions of this Court have discussed judgment liens since at least 1828. *See Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386, 443 (1828). Congress certainly knew about judgment liens when it enacted the last clause of 12 U.S.C. § 91 in 1873; and those liens could have been prohibited by the statute if Congress had intended to do so.

After arguing that Taylor's judgment lien can be enjoined because the statute does not have to be read literally, Respondents, like the court below, then rely on a literal reading of 12 U.S.C. § 91 to support the injunction. Asserting that judgment liens are the functional equivalent of attachments of property, Respondents then note the statute's prohibition of writs of attachment and conclude that judgment liens are likewise prohibited. The United States attempts to

preclude any examination of this argument by saying that this Court must defer to the construction of Texas law by the court below. However, no deference is necessary to a construction that is clearly wrong. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 & n.9 (1985).

A simple comparison of the Texas statutes demonstrates that a judgment lien is not the equivalent of an attachment of realty. The attachment requires the issuance and service of a writ while the perfection of a judgment lien does not. *Compare* Tex. Prop. Code Ann. §§ 52.001-.007 (Vernon 1984 & Supp. 1989) (judgment liens) *with* Tex. Civ. Prac. & Rem. Code Ann. §§ 61.043, 61.061 (Vernon 1986) (writs of attachment of real property). If an abstract of judgment and an attachment of realty both accomplish the same result--the perfection of a lien rather than the seizure of property--neither the writ nor the judgment lien would be subject to the prohibitions of 12 U.S.C. § 91.

Respondents also argue that Taylor's judgment lien was a preference prohibited by the statute. That argument ignores the fact that this Court has held that preferences arising by operation of law prior to insolvency and without contemplation of insolvency are not prohibited. *Scott v. Armstrong*, 146 U.S. 499, 510 (1892). And this Court has recognized the priority of creditors with statutory liens against bank assets. *Ticonic Nat'l Bank v. Sprague*, 303 U.S. at 412; *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 568 (1934). It is simply wrong for Bank One to suggest (Brief, p. 8) that only preferences by way of consensual liens are permitted. *See id.* The United States similarly

misstates the law when it claims on page 7 of its brief that the preferences allowed in *Lewis v. Fidelity & Deposit Co.*, *Merrill v. National Bank*, 173 U.S. 131 (1899), and *Scott v. Armstrong* were not asserted prior to final judgment.

The United States has focused on footnote 18 in this Court's opinion in *Impac Ltd.* as support for its contention that 12 U.S.C. § 91 prohibits any restriction on a bank's right to dispose of its assets. That argument overlooks the fact that a judgment lien does not prohibit the disposition of property or interfere with the use and enjoyment of property. *Baker v. Morton*, 79 U.S. (12 Wall.) 150, 159 (1871); *Massingill v. Downs*, 48 U.S. (7 How.) 760, 767-68 (1849); *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) at 443. An injunction, depending upon its language, can deprive a bank of its right to possess, control, or dispose of property.

THE INJUNCTION WAS ISSUED ON BEHALF OF A PARTY WITHOUT STANDING

Bank One attempts to sidestep the standing issue in this case by suggesting that the equitable relief ordered by the trial court was given to Bank One and to the FDIC as receiver. (Brief, p. 10). That is simply not true. The injunction was issued on behalf of the OCC. A later contempt order was signed to enforce the injunction previously issued by the trial court. However, the party who obtained that injunction, the OCC, neither alleged nor proved that it was bringing suit to protect some regulatory interest of the United States. The OCC simply intervened on behalf of a national bank in a private dispute that had no impact on the interests of the United States.

THE OCC NEVER PROVED IRREPARABLE INJURY

Respondents are wrong when they assert that a preliminary injunction can be issued to restrain a statutory violation without regard to equitable considerations and without proof of irreparable injury. This Court has rejected that argument. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542-43 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-16 (1982). There is nothing in 12 U.S.C. § 91, the legislative history of that statute, or in any related statute suggesting that Congress intended for injunctions to issue whenever the statute was violated.

CONCLUSION

By filing her Abstract of Judgment, Taylor perfected a judgment lien against MBank, Houston, N.A. She has never sought to enforce that judgment by a post-judgment remedy prohibited by 12 U.S.C. § 91. There has been no violation of that statute, and no injunction should have been issued on behalf of the United States, a party who failed to plead and prove

grounds for standing or for injunctive relief. The preliminary injunction issued by the trial court should be withdrawn and the case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Reply Brief of Petitioner have been forwarded by messenger to Mr. Robert D. Daniel, Hirsch & Westheimer, P.C., 700 Louisiana, 25th Floor, Houston, Texas, and by United States mail, postage prepaid to the Solicitor General of the United States, Department of Justice, Washington D.C. 20530 on this _____ day of February, 1990.

_____

ROBERT HAYDEN BURNS